BEFORE THE HEARING PANEL EMPOWERED BY THE STATE BOARD OF EDUCATION PURSUANT TO SECTION 162.961 RSMo

IN THE MATTER OF ,	**)**
	)
Petitioner,	**)**
	)
vs.	**)**
	)
CAMDENTON R-III SCHOOL DISTRICT,	**)**
	)
Respondent.	**)**

STATEMENT OF ISSUES

The issues raised by the Petitioner in his request for due process are as follows:

1. The School failed to provide a free, appropriate public education to Petitioner, consisting of special education and related services provided pursuant to an Individualized Education Program, in that the School failed to provide an appropriate educational program to Petitioner including a course of systematic, directed, multi-sensory instruction daily by an instructor trained in that method in order to educate Petitioner in the sound structure of the American English language. In so doing, the School District ignored expert and professional advice regarding teaching methods and adjustments to Petitioner's educational program.

2. The School unlawfully failed and refused to follow important terms of the IEP dated March 22, 1996, as well as all subsequent revisions.

3. The School unlawfully failed and refused to pay Petitioner for his expenses at the Churchill School during the summer of 1996.

4. The School unlawfully failed and refused to pay the Petitioner reimbursement for his expenses from necessary counseling, testing, and tutoring that Petitioner received following

his inappropriate education program at the School District and his improper treatment by the School District in disregard of his IEP.

FINDINGS OF FACT

1. At the time of the original due process hearing in this matter, Petitioner was a - year-old boy who lived with his parents and two younger brothers. He attended school in the Camdenton R-III School District ("District") from 1992 until his removal by his mother ("Parent") on October 31, 1996. Petitioner's Vol. III, Exhibit 28 ("P.III, X28"). The events giving rise to this proceeding occurred during the 1995-96 and 1996-97 school years.

2. Petitioner was home schooled from November 1, 1996, until November, 1997 when he began attending public school in the Macks Creek School District. He continued attending Macks Creek through the 1997-98 school year although he continued to live in the Camdenton R-III School District.

3. The parties stipulated that Petitioner is a child with a disability within the meaning of the IDEA and was identified as such by the School District on November 13, 1995.

4. All of the events giving rise to the issues in this hearing occurred before June 4, 1997, the date that the 1997 amendments to the Individuals with Disabilities Education Act (IDEA) became effective.

1992-1993 (First Grade)

5. In August of Petitioner's first grade year, Dr. David Fleischer, M.D. wrote Petitioner's classroom teacher stating Petitioner's need for free access to a bathroom due to a "condition which sometimes causes almost uncontrollable urgency." P.I, X11@135.

6. The report from the teacher's conference with Parent in November, 1992, indicates

Petitioner was below grade level in reading. P.I, X4@103. Petitioner's first grade report card reflects at least average achievement in all subjects except spelling and math. Petitioner passed to second grade. *Id.* @102.

1993-94 (Second Grade)

7. In September of his second grade year, Petitioner was identified by the District as eligible for Chapter I reading instruction, a program offered in addition to instruction in the classroom that is designed to strengthen basic reading skills. P.III, X37@323. Petitioner participated in this program for the next two years until Parent withdrew him on October 31, 1995.

8. Petitioner's report card reflects at least average achievement in all subjects during all quarters of second grade. P.I, X4@105. The Missouri Mastery & Achievement Test ("MMAT") results indicated low ratings in all but Numerical Concepts where he achieved a medium score. *Id.* @110. Petitioner passed to third grade.

1994-1995 (Third Grade)

9. During third grade, the classroom teacher communicated with Parent several times regarding incidents involving Petitioner's behavior. P. III, X36 @258-263 & 269.

10. The Panel is persuaded that an incident that occurred on 4/12/94 involving Petitioner urinating on the shoe and pant leg of another student in the bathroom was nothing more than a childhood prank and rejects the testimony attempting to establish that it resulted from a denial of Petitioner's access to the bathroom.

11. Petitioner's MMAT score reflects low ratings in all areas except Geometry & Measurement, which fell in the medium range. P.I X4@115. Petitioner's score in reading was

in the 1st percentile, while language arts was in the 17th percentile. The third grade report card notes progress in almost all areas, and Petitioner passed to fourth garde. P.I, X4@112-13.

1995-1996 (Fourth Grade)

12. In August, near the start of the fourth grade year, Parent expressed concern about Petitioner's low test scores to Richard Hodits, Upper Elementary Principal. Mr. Hodits did not provide information to Parent about special education or the process for referral. Transcript ("Tr.") 845.

13. In September, Parent took Petitioner to Miller County Psychological Services for counseling. Dr. Willis, a psychologist, Dr. Jeanette A. Williams, a licensed psychologist, and Lawrence Lent, a therapist (now Dr. Lent) were all associated with the clinic at that time. Tr. Lent @ 31. Dr. Williams evaluated Petitioner and noted the existence of low self esteem and problems with control of urine and bowels. P. III, X3 @ 9. She initially diagnosed Petitioner with Adjustment Disorder with Mixed Disturbance of Conduct and Emotion and Reading Disorder and recommended individual psychotherapy. *Id.*

14. On October 3, Dr. Williams administered the WISC-R and the reading portion of the Woodcock-Johnson Psycho-Educational Battery at Dr. Lent's request. P.I, X11 @133. She concluded that Petitioner's intellectual functioning was average and that he should be able to make average grades with average effort. *Id.* His reading achievement was "over a grade and about a year and nine months behind the average of others at his age and grade level." She concluded that "reading would very likely be too difficult for him in the regular fourth grade classroom." *Id.*

15. Commencing in October, Dr. Lent provided individual and family therapy to

Petitioner for the purpose of calming him down and helping him understand the situation. Tr. Lent @ 20-21. In Dr. Lent's opinion, the therapy was necessitated by pressure placed on Petitioner at home, *id.* @ 13, 36-37, and at school. *Id.* @ 21. When he suspected that "more was going on" than just the reading program, Dr. Lent and Dr. Willis administered more tests resulting in the diagnosis of generalized anxiety disorder by Dr. Willis. *Id.* @ 70.

16. Parent voiced her concerns about Petitioner to Ms. Lakatos, the fourth grade teacher, on October 9, Tr. 533, and requested that Petitioner be tested. *Id.* @533-34. The teacher suggested that Parent talk to Anne Scott, the chairperson of the Department of Special Services, about making a referral. *Id.* @ 534.

17. Parent also talked with Ms. Alexander about special education testing. Faced with competing accounts placed in different time periods, the Panel is persuaded that, although Parent and Ms. Alexander first met at a parent support meeting prior to the beginning of the 1995-96 school year, Ms. Alexander's conversation with Parent about special education most likely occurred on or after October 9. See, e.g. TR. 936-37 and P.IV, X55 @469 (recording thirteen instances of contact between parent and district, nine apparently initiated by parent, three by District, and one unknown).

18. Parent signed the Initial Referral form on October 16. P.III, X40@409. Parent received notice for initial evaluation and consented to an evaluation on October 23. Appropriate procedural safeguards were given at that time. Respondent's ("R") 7, Tr. 809, 941.

19. An Evaluation Plan was completed by Ms. Scott and Ms. Lakatos on October 24. P.III, X42. Between October 23 and November 3, a battery of tests was administered by Anne

Scott, who also observed Petitioner in the classroom. Tests included a Conners Rating Scale, Social Skills Rating System, Woodcock Johnson Achievement-Revised, TOWL-2, a second Woodcock Johnson Achievement-Revised and the PIAT-R. P.III, X43.

20. Parent filed a complaint with the Office of Civil Rights ("OCR") on October 27 generally alleging discriminatory acts by District against Petitioner. P.V, X20.

21. On November 6, Parent filed a complaint with the Office of Civil Rights alleging the District discriminated against Petitioner on the basis of sex when he was disciplined for an incident and a female student involved was not punished. The complaint also claims the District retaliated against Petitioner because of Parent's actions. P.V, X 16 @ 142.

22. On November 13, based on the results of the testing and observation referred to in #19 above, based on Petitioner's written language samples, based on the report from Dr. Fleischer dated 8/17/92, based on a WISC-R, based on the portion of the Woodcock Johnson conducted by Jeannette Williams and based on concerns expressed by the Parents, Petitioner was diagnosed with a learning disability in Basic Reading Skills and Written Expression. This diagnosis was made even though Petitioner's scores on both Woodcock Johnson-Revised tests administered by the classroom teacher were above the state mandated criterion levels and Petitioner's grades were satisfactory. R. 10.

<u>November 15, 1995 IEP Conference</u>

23. A meeting was scheduled for November 15 to consider an individual education program ("IEP") for Petitioner. Appropriate notice was given to Parents. The notice reflected that an initial IEP would be developed and extended school year programing would be considered. R. 11.

24. At Parent's request, therapist Lawrence Lent attended the IEP meeting and suggested modifications that would help Petitioner deal with an anxiety disorder, such as using a tape recorder for testing and having untimed tests. Tr. Lent @ 16. He also suggested appropriate methods of discipline. *Id.* @ 18. Work on developing an IEP was begun at this meeting, but, contrary to assertions by Parent, the conference ended without a completed IEP.

25. Dr. Lent attested to the hostility existing between the parties saying "[t]his was not a typical IEP [meeting] for a kid . . . [t]his is one of the biggest messes I've ever seen." Tr. Lent 39.

26. Dr. Lent wrote a letter dated November 19 to the IEP team that included a diagnosis of generalized anxiety disorder and a description of how it would affect Petitioner's educational process. R-13. Dr. Lent indicates that "anxiety blocks him from doing his best."

27. Dr. Lent based this letter on a review of Petitioner's chart. The diagnosis of generalized anxiety disorder was taken from Dr. Willis' report. Tr. Lent 12. Dr. Willis' report was not placed in evidence, nor did he testify. Dr. Lent testified that his reference to encopresis and enuresis was based directly on a conversation he had with Parent and not on a physician's report. *Id.* @ 38. He also stated that he never assigned a diagnosis to Petitioner. Tr. Lent 62.

28. On November 17, Parents requested an assistive technology evaluation in a letter to the School District. P.I, X 8 @ 121. The record is silent as to whether procedural safeguards were given in response to this request.

29. On November 20, prior to the completion and implementation of Petitioner's IEP, Parent wrote the classroom teacher to object to modifications the teacher proposed in her

letter of the same date which can be found at R-14. The letter reflects that copies were sent to Missouri Protection & Advocacy, OCR, Department of Elementary and Secondary Education (DESE) and four individuals, including the principal. R-15.

30. On November 22, Petitioner was involved in an incident in which he called a girl a pussycat and was required by a teacher to write an apology to her class. R-17, P.I, X 5 @ 117. Parent reported this incident to OCR by telephone on November 27. On November 28, Petitioner was disciplined along with several other boys over a pushing incident on the playground. P. III, X 36 @ 272.

31. This Panel concludes that the various incidents involving Petitioner's behavior, those already referred to and those later described, do not indicate anything more than typical behavior of boys Petitioner's age. Although there were occurrences where Petitioner received discipline for his acts, credible testimony established that he was generally a cooperative and well-behaved child who was not a discipline problem.

November 29, 1995 IEP Conference

32. The IEP conference was reconvened on November 29 and an IEP was completed. R-20. Although Parent placed in evidence several versions of IEP's with minor variations among them, and claimed that the District altered certain IEP's and hid others from her, e.g. P.III, X14, the Panel accepts the testimony of Ms. Alexander on this issue as credible. TR. 975-76, 1023-34.

33. The IEP appearing at R-20 is a copy of the original completed IEP and all subsequent IEP's are modifications of that document. Any IEP's prior to this date were working drafts utilized at the November 15 meeting that were never understood or intended to be implemented as final documents. Most were copies used as working drafts during and after IEP meetings. Many of the drafts contained in the exhibits were never developed into completed IEPs.

34. This initial IEP states Petitioner is not eligible for Extended School Year, will participate in 1800 minutes per week of regular education and 150 minutes of a modified regular instructional program. He will also receive 100 minutes of consultation. Service will begin 11/30/95 and will end 11/30/96. The Present Level of Performance describes with particularity Petitioner's difficulties with reading skills and written expression.

35. In Petitioner's case, modified regular instructional program referred to the time he would spend each week working one on one with Anne Scott on reading skills. Although contrary testimony was received, the Panel accepts the testimony of Anne Scott on this issue as reliable. Tr. 1243-44, 1265. Parent knew from the IEP meeting onward that Petitioner would be working one on one with Scott.

36. The IEP states two goals with attendance objectives. The first is "[t]o improve basic reading skills" and the second is "[t]o improve written expression." Appropriate evaluation criteria is stated as is the procedure for evaluation. Obtaining an Assistive Devices evaluation by 1/19/96 (apparently later revised to 4/5/96) was among the objectives for accomplishing the first goal. A Brigance, which is a criterion reference test, is listed as one procedure for evaluating work recognition skills together with a teacher checklist. The review date for the evaluation results is stated as 11/29/97.

37. The following education modifications were incorporated into the November 29 IEP at the meeting:

1. Petitioner will be allowed to complete . . . book reports worth 10 points each with the following modifications: on independent reading level, 30-40 pages in length, to be done at his own pace and in his preferred format (ex; reports orally, tape recorded, dictated to individual or typed/printed on computer.);

2. Use of Accelerated Reader will be explored. Test on Accelerated Reader may be turned in in lieu of book report. If Petitioner scored below 60%, he could report on the book in other ways (See #1 above.);

3. Basic Word List (18 words) will be Petitioner's weekly spelling list. Petitioner will be required to complete workbook pages directly related to his spelling words. 50% of each (illegible) skill covered will be completed when appropriate to reduce amount. Spelling pre-test will <u>not</u> be given. Petitioner will copy work list to study at home in lieu of taking spelling pre-test;

4. Written stories and report will be reduced 50% from normal requirement.

Basic writing conventions will be reduced 50% from normal requirement. Basic writing conventions (ex: spelling, punctuation, capitalization, grammar and complete sentences) will not be graded in other subject areas not related to spelling. Grade only for knowledge of concepts/skills;

5. Testing will be modified in all subject areas if written responses are required. Preferred format for testing will be: multiple choice, matching, fill in the blank w/work bank, use of recorder for Petitioner to listen and second recorder for responding to questions, or answer orally to Special Education teacher;

6. Printed instructions will be clarified to Petitioner by teacher: reading aloud, highlighting, underlining or circling clue words. If after completing of assignment, the teacher observes that Petitioner has not followed directions, Petitioner may have a chance to re-do assignment;

7. Petitioner will receive taped teacher's review of material/concepts to be tested prior to taking test in all subject areas. Special Education teacher will determine reduction of reading worksheets;

8. "Teacher" written study guides will be provided prior to any major tests. (ex. Chapter Tests);

9. A copy of key words and taped basal reading stories will be sent home prior to beginning stories in class;

10. When Petitioner is required to read orally, he will be required to read aloud 1 to 2 sentences;

11. Parents will be provided with the week's (1) projected assignments to be

sent home on Mondays of each week;

12. Daily assignment sheet for Petitioner will be prepared for by the teacher and signed by parent at home. Written notices will be sent to teacher if assignment was not complete for any reason;

13. Parents will receive notification of any significant behavioral issues requiring discipline report from the teacher and parents or private counselor will deal w/consequences. Any written disciplinary report will be sent home w/Petitioner in a sealed envelope;

14. Petitioner will be spoken to in a private manner regarding behavioral issues. Confrontation will not be in front of a group;

15. Recess time will not be taken from Petitioner due to noncompletion of work;

16. Petitioner will be able to utilize the bathroom at any time including special events outside of school (ex: field trips.);

17. Math and English assignments will be photocopied and enlarged;

18. Math assignments will be reduced 50%. Petitioner will complete even numbered items only;

19. Geography, Missouri History and science/health books will be highlighted (terms/definitions) and taped; and

20. Petitioner will not be retained in any school year.

38. The page entitled Least Restrictive Environment Considerations carries the date 11/15/95 and states that regular education and resource placement options were considered.

The signature page, which is also dated 11/15/95, lists Richard Hodits as local educational agency representative, both parents, Anne Scott as special educator, Janeal Alexander and Larry Lent. Attendance and participation by these individuals satisfied the requirement of § 1401(a)(20) of the IDEA prior to reauthorization.

39. The diagnostic summary dated 11/13/95, R-10, was revised to include Dr. Lent's letter on November 29. R-19. Petitioner was diagnosed with a learning disability in basic reading skills and written expression. *Id.* There was no mention of an anxiety disorder nor was there a behavior management plan as such. Services under the IEP were to be initiated on November 30.

40. Notice of Intent to Place and Consent to Place was furnished to Parent on November 29. R-21. Placement was described as regular education with modifications. The notice reflected that resource special education was considered but rejected because regular education with modifications is the least restrictive environment. *Id.* Parents signed acknowledging their understanding of the notice and of the procedural safeguards. *Id. see, also* Tr. 809.

<u>January 29, 1996 IEP Conference</u>

41. Notice of an IEP conference scheduled for 1/29/96 was given to Parents on 1/25. R-24. The purpose of this meeting was to consider review/revisions of the IEP. *Id.* The initial IEP from November 29 was used as a draft. One minor adjustment to Petitioner's program is noted: modification #3 was changed from 18 words to 20 words. An Assistive Devices evaluation had not been completed. Regular education and resource were considered as placement options. Principal Rich Hodits attended as LEA representative, both parents were

present, as were Anne Scott and Jeaneal Alexander. There was no change in Petitioner's placement, and procedural safeguards were not triggered regarding this IEP.

42. In anticipation of an IEP meeting in March, the chairperson of the Special Services Department, Anne Scott, who worked individually with Petitioner on a daily basis, prepared a draft of Petitioner's Present Levels of Performance. This summary provided specific information detailing improvement in Petitioner's reading skills and written expression. R-29.

March 12, 1996 IEP Conference

43. A fourth IEP meeting was held March 12. Ms. Scott's notes reflect that parents' attorney (who was present at the meeting as was Lawrence Lent) would draft a formal request for learning style and assistive device evaluations. P. IV, X 53 @ 446. The meeting adjourned without a completed revised IEP.

44. Two days after this meeting, District sent parents a Consent for Release/Mutual Exchange of Information form directed to Easter Seals for the purpose of obtaining an assistive technology evaluation. P. I, X 14 @ 150. Parents declined to sign this release.

45. On March 18 and 19, Linn Suderman, Ph.D., a Registered Professional Counselor in Lawrence, Kansas, evaluated Petitioner at Parent's request. According to her report, she administered the following tests: Slingerland Screening Test; Diagnostic Evaluation for Scotopic Sensitivity Syndrome; Peabody Picture Vocabulary Test-Revised; Lindamood Auditory Conceptualization Test; and Spadafore Diagnostic Reading. P. I, X 16. Dr. Suderman also relied on the testing of Dr. Williams and information from Dr. Lent's November 19th letter to the District. *Id.*

46. The characterization by Dr. Suderman of Dr. Lent's report as an additional evaluation diagnosing Petitioner with Generalized Anxiety Disorder, Adjustment Disorder, Encopresis, etc. is erroneous. Dr. Lent was unequivocal in his testimony that he never assigned a diagnosis to Petitioner. Tr. Lent 62. His report was based totally on Williams' and Willis' testing and diagnoses as reflected on Petitioner's chart and not on his own evaluation or diagnosis. His statement regarding encopresis and enuresis was based on a conversation with Parent.

47. Dr. Suderman concluded on March 28 that Petitioner has a specific language disability, dyslexia in the high moderate range of severity, scotopic sensitivity syndrome, possible dysgraphia, anxiety, and possible attention deficit hyperactivity disorder. P. I. X 16 @ 161. She recommended further assessment for Attention Deficit Hyperactivity Disorder (ADHD), compensatory tools and strategies, classroom adaptations, educational remediation, and counseling. *Id.* @ 181-85. This was not an educational diagnosis. It supported the diagnosis of specific learning disability but did not add any additional information that affected Petitioner's learning situation.

48. On March 21, Ms. Alexander admitted in a letter to Parents' attorney that a substitute teacher violated modification #15 of the IEP on March 4 by denying Petitioner a recess due to the noncompletion of school work. R-37. The District requested an IEP meeting to address the issue and consider compensatory services. *Id.* Similarly, Ms. Scott noted that some modifications in the IEP (highlighting, copying/enlarging pages) had not been followed on occasion. P. IV, X 53 @ 447.

<u>Proposed IEP Conference</u>

49. Notice of another IEP conference is dated March 20. R-35. The meeting was scheduled for March 22 to consider reviewing and revising the IEP and compensatory services related to IEP modification #15. A note on a copy of the notice indicates Parent called to reschedule. R-36. The cancellation of the meeting is confirmed in the notes of the classroom teacher. P.IV, X 56 @ 470. The IEP contained in the hearing exhibits is a copy of a draft and not a completed document.

50. In a letter from Ms. Alexander to Parent's attorney dated March 21, District states its willingness to consider suggestions for additional evaluations including an environmental assessment. R-37. The working draft of Petitioner's present level of performance that had been prepared for use at the conference on March 22 was enclosed with this letter.

51. At a diagnostic staffing on April 3, which was attended by Principal Hodits, Ms. Alexander, Director of Special Programs, Ms. Lakatos, the classroom teacher, Anne Scott, chairperson of Special Services, and Cindy Gum, Assistant Principal, Dr. Suderman's report was considered apparently at Parent's request. R-87. Notes were typed at the side of the pages reflecting the reaction and analysis. The group rejected Dr. Lent's discussion regarding Petitioner's anxious behavior and reaffirmed the Conners and Social Skills Rating in the current diagnostic summary as reflective of actual school behaviors. Tr. 1329-31.

52. The participants rejected the diagnoses of dysgraphia and scotopic sensitivity syndrome, *Id.* and noted disagreement with Dr. Suderman's conclusion that Petitioner is at risk for Attention Deficit Hyperactivity Disorder, which was based, at least in part, on an evaluation completed by the parents at home. P.I, X 16 @ 161 & X 151; Tr. 990-93; 1011-12;

1287-88. The Panel considers that this assessment was dealt with sufficiently.

53. On April 18, a substitute teacher did not immediately allow Petitioner to go to the bathroom, but stepped across the hall to ask a regular classroom teacher if permission should be granted. R-39. Although access may have been delayed somewhat, it was not denied. Testimony as to whether Petitioner had an "accident" as a result of the delay was inconclusive.

54. In a letter to the District dated April 17, Parent's attorney suggests waiting to write an IEP for the 1996-97 school year until after Petitioner attended summer school at the Churchill School. R-38. He also prospectively requested reimbursement for summer school tuition at the Churchill School and payment for glasses for Petitioner. R-38. The glasses referred to are not for acuity. The forms completed by Ms. Lakatos and Ms. Scott for the Churchill School state that Petitioner received special services for learning disabilities thirty minutes a day one-on-one. R-40.

<u>May 8, 1996 IEP Conference</u>

55. On May 7, the District mailed and telephoned notice of an IEP meeting to Parents. The meeting was scheduled for the next day, and its purpose was to review and revise the IEP, consider compensatory services and outside evaluation information and requests. Apparently, a meeting did take place, but no agreement was reached as to Petitioner's IEP except that the Parents' attorney advised the District that the request for an assistive technology evaluation was withdrawn. R-56.

56. The Panel is not convinced of the reliability of various notes and memoranda in the exhibits that attempt to reconstruct past events, e.g. notes at R-47 (recalling happenings of more than a year before), discounts their usefulness and places no reliance on them in making

its decision.

57. Petitioner was again disciplined for a behavior incident on May 21. This was a pushing incident where two boys were sent to the end of the line, but a girl was not. Once it was discovered that the girl had misbehaved too, she was disciplined. P. II, X 42 @ 440. When Parent went to the superintendent's office to deliver a letter, R-55, and discuss this matter with him, a verbal altercation ensued. Tr. 621-24; 1380-83. As a result, on May 23, Parent filed a child complaint with OCR claiming retaliation, violations of an IEP and discrimination. P. II, X 39.

58. On May 30, Parent filed a child complaint with DESE alleging failure to implement Petitioner's IEP by denying access to the restroom, not allowing Petitioner to attend recess and not modifying textbooks or providing an assistive technology evaluation in violation of state and federal regulations implementing P.L. 94-142. P. V, X 17 @ 164. These are essentially the issues raised in the case at hand.

59. DESE found that Petitioner had not been denied access to the restroom, found that the denial of five minutes of recess was an isolated incident that did not result in a denial of services, found that inconsistent audiotaping of books was a violation and required assurance it would not continue, and found that an assistive technology evaluation was no longer required since Parents notified the District that they accepted the Suderman report as such. R-68.

60. In a letter dated September 12, OCR announced that it would not pursue the allegation that the District failed to implement the IEP because DESE provided a resolution process and had already reached a decision comparable to that available through OCR. OCR

concluded that the other incidents complained of did not constitute adverse actions within the meaning of the statutes enforced by OCR. R-82.

61. Petitioner's fourth grade report card, which indicates adjusted material in every subject, reflects better than passing grades. R-61. Combining all grades from all quarters during the year reveals that Petitioner made 3 C-'s, 5 C's, 2 C+'s, 4 B-'s , 4 B's, 2 B+'s, 3 A-'s, and 1 A. His effort was noted as satisfactory throughout. He passed to fifth grade. While testing was modified in the classroom, it was not when Petitioner took the MMAT in May, 1996, except that he was allowed to take the test away from the group. R-98. Petitioner's low scores on the MMAT reflect this variance.

<u>Summer of 1996</u>

62. For six weeks, Petitioner attended the Churchill School, a school in St. Louis County whose mission is to remediate specific learning weaknesses of students with a high potential diagnosed learning disability and return them to the mainstream as quickly as possible. Tr. I @ 162. Ms. Elfrink, Assistant Director at the Churchill School, testified about the school. Churchill uses a linguistics approach to reading, which is a modified Orton-Gillingham approach. *Id.* @ 164. Typically, a student will spend forty-five minutes a day in a tutorial session which is one-fifth of the day. *Id.* @ 167. A tutorial is one-teacher, one-student with the emphasis on the primary skill breakdown. The instruction is specifically designed for the individual student. *Id.* @168.

63. At Parent's request, Churchill recommended effective techniques to the District for use with Petitioner in a traditional setting. *Id.* @ 190; P. II, X 27 @ 359. Churchill assigns homework regularly, generally ten minutes for each grade level attained, e.g. 50 minutes for a

fifth grader. Tr. 191-92. If students do not do their homework (parents are not supposed to help), they miss recess. Taking away recess is an effective technique. *Id.* @ 212. Books on tape mean that the textbook is recorded for the student to listen to and follow along. *Id.* @ 199. The computer keyboards are covered at Churchill. *Id.* 211.

64. Also during the summer of 1996, Petitioner accompanied Parent to Michigan where Parent attended a two week workshop offered by the Michigan Dyslexia Institute. The workshop was an introduction to the Orton-Gillingham approach to teaching persons with dyslexia. John Howell, Ph.D. administered several tests to Petitioner without charge. The data was not assessed or formally written up. The purpose of testing Petitioner was to provide performance benchmarks of selected language skills possessed by him at that time. Petitioner participated as a teaching subject. The instruction he received constituted the practice teaching requirements of workshop participants. P. II, X 28.

65. On June 18, a Consent for Release/Mutual Exchange of Information was sent to Parent by the District in an effort to secure a re-evaluation of Petitioner by the Assessment and Consultation Clinic at the University of Missouri-Columbia. Parent did not respond. P.II, X 53. The Description of Areas to be Assessed reveals that the District was seeking an assessment in the areas of Language, Intellectual/Cognitive, Social/Emotional/Behavioral and Academic Achievement. P. II, X 54.

66. On the same date, Notice of Action for a proposed re-evaluation was given by the District. The notice stated that procedural safeguards were enclosed. P. II, X 55. A letter from Ms. Alexander to Parent on the same day also stated that procedural safeguards were enclosed. The District was seeking to have an independent agency review and re-evaluate all

areas of educational concern, including assistive technology. P. II, X 56. On July 3, Parent's attorney rejected the proposed re-evaluation and demanded that Churchill School staff conduct any evaluation. P. II, X 50.

67. By letter to the District dated July 23, the attorney for Parent demanded adaptations and accommodations in the IEP, training to enable teachers to implement them and reimbursement for costs and expenses of the Churchill summer school session. P. II, X 51.

1996-1997 (Fifth Grade)

68. In August, Petitioner's aunt, Mrs. F, began tutoring him. By undated letter, probably in late summer, Parent made specific demands for Petitioner's IEP, including instruction by teachers trained in the Orton-Gillingham approach. P. II, X 36.

August 23, 1996 IEP Conference

69. On August 21, Ms. Alexander notified Parent of an IEP meeting scheduled for August 23. The meeting was attended by Parent, Ms. Alexander as LEA Representative, Cindy McKay, the regular classroom teacher, Deanna Harris, a special education teacher, Anne Scott, Chairperson of Special Services and Rich Hodits, Upper Elementary Principal. R-71.

70. Once again the initial IEP was used as a draft, and minor revisions were made, mostly in the form of deletions. The modified regular instructional program was reduced to zero minutes "per parent request." R-73. The Present Level of Performance remained the same as did the goals and objectives. The last phrase of Modification #5 stating "or answer orally to special education teacher" was deleted. "Special Education teacher will determine reduction of reading worksheets (assignments)" was also deleted. The Least Restrictive

Environment Consideration form listed the November, 1995 dates and a signature page reflected the same November dates listed previously. An additional signature page reflecting the August date and the identity of the participants was appended.

September 6, 1996 IEP Conference

71. The IEP begun in late August was finalized on September 6 and incorporated many of the accommodations and recommendations from Churchill School - twenty-two modifications in all as follows:

1. Petitioner may complete 20 book reports on his independent reading level, 30-40 pages in length;

2. Petitioner will utilize provided modified spelling list when possible or reduce regular classroom spelling list;

3. Petitioner will be accountable for spelling from his weekly list, but not for words he uses on his own;

4. Basal reading, social studies, and science text (science text may have only a particular reference) will be recorded/highlighted by the school for use at home on school provided tape recorder. Blank tapes will be provided for Petitioner to use to record appropriate assignments. Teacher will tape classroom review of test and send tape home with Petitioner;

5. Petitioner will be provided with his own copies of textbooks so that he may highlight and make holes in the text. These will include basal reading, social studies, and science references from various texts. Study guides will be provided prior to any major test;

6. Petitioner will have his own copies of novels on his independent reading

level so that he may highlight and make notes;

7. Petitioner will have shortened math assignment by 50%. Written language assignments requirements will be reduced by 50%;

8. Petitioner will be able to use a calculator to check multi-step problems. Math problems will be copied if regular assignment requires copying from text/board to paper;

9. Petitioner will have a review of concepts before applying them to his assignment;

10. Teacher will give 1 to 2 step directions at a time and check for understanding by having Petitioner paraphrase or repeat directions in his own words;

11. Homework assignments may be review learning or noncompletion of modified classroom assignments. Homework time will be 15 minutes per night;

12. Teacher may reword directions on worksheets into simpler terms when appropriate. Petitioner may complete an example before he begins the assignment independently;

13. Testing will be modified when appropriate. (ex. untimed testing, tests read orally, modified format);

14. Teacher will use both visual and auditory presentation of information with examples;

15. One on one/small group/individualized keyboarding instruction/practice will be done in conjunction with language/reading activities;

16. Petitioner will read only 1 to 2 sentences when reading orally;

17. Petitioner will keep his own daily assignment sheet and will be checked by teacher for accuracy. Written notices will be sent to the teacher from the parent if assignments are not completed for any reason. Notification of new concepts will be given to the parents as appropriate;

18. Parent will receive notification of any significant behavioral issues requiring discipline reports from the teacher. Parents or private counselor will deal with the consequences. Any disciplinary report will be sent home with Petitioner in a sealed envelope;

19. Petitioner will be spoken to in a private manner regarding behavioral issues. Confrontation will not be in front of a group;

20. Recess time will not be taken from Petitioner due to noncompletion of work;

21. Petitioner will be able to utilize the bathroom at any time including special events outside of school (ex: field trips); and

22. Petitioner will not be retained in any school year.

72. The signature page, which is not dated, reflects that Jeaneal Alexander was present as the LEA Representative, Anne Scott attended as Teacher of Special Education, and Parent participated by telephone. R-80. The IEP did not call for a change of placement.

73. The social studies teacher testified that there was one instance when she violated these modifications by failing to tape a review of a test. Tr. 1362. There was no evidence of any other failure to implement these modifications.

74. A letter from Parent to classroom teacher, dated October 14, asked the teacher to send a completed study guide home with Petitioner. R-88. The fifth grade teacher's response

reflects hostility between the two adults. R-89.

75. On October 14, Petitioner and his brother were involved in a fight with two other boys on the school bus. In an effort to find out what had happened, the principal recorded a conversation with the boys by tape recorder as an alternative to requiring the boys to write an account of what happened. Transcript at P. I, X 25. When Parent confronted Principal Hodits about the incident with the tape recorder, Hodits recorded that conversation too. Tr. 894-5. Transcript at P. II, X 60 @ 542-75.

<u>October 25, 1996 IEP Conference</u>

76. Another IEP meeting was scheduled for October 25, and in preparation for the conference, Parent sent a list of twenty-five demands to District for inclusion in the IEP. R-92. This meeting did not occur.

77. Parent withdrew Petitioner from school on October 31, _____, and notified the District that he would be home schooled. P. III, X 30. At the time Petitioner was withdrawn, he was achieving satisfactory grades. R-96. The IEP had not yet reached its one-year anniversary date.

78. On the day that Parents withdrew Petitioner from school, they requested copies of records that the District had accumulated on Petitioner. P. III X 28. The District provided the parents with copies of the contents of the permanent file, including testing results, attendance records, grade cards, major discipline reports, if any, and health records in accordance with their usual policy. Tr. 931. District did not provide copies of teacher logs at this time. Parent acknowledged in her letter dated November 11 that the records were received. P. III, X 30.

79. In connection with the request for due process filed May 21, 1997, which was

essentially based on the same issues as the present case, Tr. 835, R-99, Parents requested access to school records. Certain teacher logs and records of teacher observations were apparently furnished to Parents for the first time at depositions held in September, 1997. Tr. 791, 835. Subsequently, Parents examined records at the District's office. The request for due process leading to this decision was originally received by DESE on November 19, 1997, near the time when Parents viewed the records.

CONCLUSIONS OF LAW

80. This Three-Member Hearing Panel was validly constituted and has jurisdiction of Petitioners' claims of violations of the Individuals with Disabilities Education Act ("IDEA") pursuant to 20 U.S.C. § 1415 (e)(1990) and § 162.961 RSMo. Hearing Panel Exhibit #1 ("HPE #1").

81. The forty-five day statutory timeline has been validly extended upon written requests by one or both of the parties several times. The original decision in this matter was issued by August 14, 1998, in accordance with the forty-five day timeline, as extended. This decision was issued before August 30, 2002, in accordance with the forty-five day timeline, as extended. *See below*, Deviations from Forty-five Day Timeline.

82. The original Hearing Panel ruled that it did not have jurisdiction over any separate claims that the District discriminated against Petitioner in violation of § 504 of the Rehabilitation Act of 1973. *Mourbry v. Independent School District No. 696*, 951 F. Supp. 867 (D. Minn. 1996). Petitioner voluntarily abandoned this claim prior to the reconvening of the current Due Process Hearing Panel.

83. The IDEA, 20 U.S.C. § 1400, *et seq*., was amended effective June 4, 1997.

However, the provision of the reauthorized act relating to individualized education programs ("IEPs") did not take effect until July, 1998.

84. The IDEA requires that all children with disabilities be provided a free appropriate public education ("FAPE"). 20 U.S.C. § 1400 (c)(1990).

85. Petitioner is a child with a disability for purposes of the IDEA. 20 U.S.C. § 1401 (a)(1)(1990). His identification as a student with a specific learning disability in basic reading skill and written expression comports with the specific learning disabilities delineated in Missouri law.

86. At the administrative level, the school district has the burden of proving that it complied with the IDEA. *E.S. v. Independent School District , No. 196*, 135 F.3d 566 (8th Cir. 1998). The School District urges this Panel to deviate from this ruling. However, in light of this Panel's determination that the School District provided Petitioner a free appropriate public education, we need not decide the burden of proof question.

87. The School District also asks this Panel to find that, in light of certain recent acts of the Missouri General Assembly, this Panel should not be bound by the remand directives of the Missouri Court of Appeals, Western District, and the Cole County Circuit Court. This Panel takes official notice of sections 1.170 and 1.180, RSMo, along with the Missouri case law construing same, and declines the School District's request that we consider the Court of Appeals' and Cole County Circuit Court's decisions "suspect." This Panel has utilized the higher "maximization" standard as interpreted by the Court of Appeals in *v. Camdenton R-III School District*, 68 S.W.3d 518 (2002).

88. FAPE is defined in the IDEA as special education and related services that: (1)

are provided under public supervision and at public expense without cost to parents; (2) meet the standards of the state education agency; (3) include an appropriate preschool, elementary, or secondary school education; and (4) are provided in conformity with the individualized education program required by § 1414(a)(5) of the act. 20 U.S.C. § 1401(a)(18)(1990).

89. The IDEA's definition of a "free appropriate education" is contained in 20 U.S. C. § 1401(a)(18), which provides:

> **(18) The terms "free appropriate public education" means special education and related services that –**
>
> **(A) have been provided at public expense, under public supervision and direction and without charge,**
>
> **(B) meet the standards of the State educational agency,**
>
> **(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and**
>
> **(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title. *v. Camdenton R-III School District,* 68 S.W.3d 518, 523 (Mo. App. W.D. 2002).**

90. This instruction and services, however, "must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP." @ 524.

91. Because the IDEA requires that a state's special educational services meet the state's educational standards in addition to the Act's standard, several courts have concluded that the Act incorporates by reference state standards that exceed the minimum standard set by the IDEA and articulated in *Rowley.* @ 524.

92. Thus, while the IDEA sets forth the minimum standard a state's program must meeting, "[i]f a state legislature chooses to require more for its program, the state standard

must be met in order to obtain federal special education funds." @ 524.

93. Since the IDEA mandates that a state's special educational services meet the state's educational standards in addition to the Act's standard, this Panel is required to apply the Missouri standard in determining whether the District provided a free appropriate public education. @ 524, fn. 4.

94. Missouri received federal special education funds through the IDEA, and the statutes setting forth this state's special education policy and program are found in §§ 162.670 to 162.995. @ 524-525.

95. Section 162.670 declares the state's policy regarding the education of handicapped children: "[I]t is hereby declared the policy of the state of Missouri to provide or to require public schools to provide to all handicapped and severely handicapped children within the ages prescribed herein, as an integral part of Missouri's system of gratuitous education, special educational services sufficient to meet the needs and *maximize the capabilities of* handicapped and severely handicapped children. @ 525.

96. Missouri's policy is to provide special educational services sufficient to meet the needs and increase to the highest degree the capabilities of handicapped children. In contrast, the standard set by the IDEA is that the special educational services be useful to, or aid, advance, or improve handicapped children. Considering the plain meaning of the terms "maximize" and "benefit," Missouri's maximizing standard for determining the sufficiency of special educational services for disabled or handicapped children is higher than the educational benefit standard set by the IDEA. @ 525.

97. The maximizing standard is stated in other statutory provisions besides §

162.670. @ 525.

98. Section 162.675(2) defines "handicapped children" as children under twenty-one years "who have not completed an approved high school program and who, because of mental, physical, emotional or learning problems, *require special educational services in order to develop to their maximum capacity.* @ 526.

99. Section 162.675(4) defines "special educational services" in part, as "programs designed to meet the needs and *maximize the capabilities of* handicapped and severely handicapped children . . ." @ 526.

100. The state standard for determining the sufficiency of special education services is found in § 162.670 and § 162.676. The legislature has not delegated the power to establish such a standard to the State Board of Education. The legislature has only empowered the State Board of Education to promulgate 1) regulations concerning the standard for identifying handicapped children under the definitions contained in §§ 162.670 to 162.995; 2) regulations concerning the evaluation and re-evaluation of handicapped children before and during assignment in a special education program; and, 3) standards for approving all special education programs established under §§ 162.670 to 162.995, including the qualifications of personnel and the standards for determining the assignment of the children to particular programs. @ 526.

101. None of the regulations the state board of education is empowered to adopt concern the standard to be used in evaluating the sufficiency of the special educational services provided to a particular handicapped child. @ 526.

102. Thus, § 162.685(1), (2), and (3) do not empower the state board of education

to promulgate regulations and standards that conflict with or modify the maximizing standard set forth in §§ 162.670 and 162.675. @ 527..

103. Since none of the regulations the State Board of Education is empowered to adopt concern the standard to be used in evaluating the sufficiency of the special education services provided to a particular child with a disability, this Panel must determine whether the state standard has been met by relying on the evidence presented. This panel must determine from all the evidence presented whether the school district created and implemented an IEP that was reasonably calculated to maximize Petitioner's capabilities. Borrowing from the Missouri Court of Appeals' Western District's opinion previously issued in this case, along with the Michigan caselaw upon which it relied in that decision (which is one of the few resources providing this Panel with guidance on this issue), this Panel must determine whether Petitioner's IEP was reasonably calculated to provide Petitioner with meaningful educational benefits that amounted to something more than de minimis educational benefits. @ 525.

104. "At the administrative level, the school district clearly has the burden of proving that it complied with the IDEA." *E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8th Cir. 1998). As noted, the IDEA requires the provision of a free, appropriate public education. A free, appropriate public education must meet the standards of the state educational agencies. In this case, the standard requires that the school district design an IEP and provide special education services reasonably calculated to maximize Petitioner's capabilities.

105. Parents are not required to keep their child in an educational program they

feel is inappropriate. However, the IDEA "operates in such a way that parents who unilaterally change their child's placement during the pendency of the review proceeding, without the consent of State and local officials, do so at their own financial risk." *School Committee of the Town of Burlington, Massachusetts v. Department of Education*, 471 U.S. 359, 373-375, 105 S.Ct. 1996; 85 L.Ed.2d 385 (1985); *Fort Zumwalt School District v. Clynes, supra.*, 119 F.3d, 611-612. Reimbursement is proper only if the IEP is determined to be inappropriate and the parents' placement is determined to be appropriate. *Burlington, supra*., 471 U.S., 370. Otherwise, the costs do not shift and the parents must bear the costs of the private placement. *Burlington, supra.* 471 U.S., 370; *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993).

The IDEA Regulations, 34 C.F.R. § 300.403 state in pertinent part as follows:

"(a) *General.* This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility . . . .

(b) *Disagreement about FAPE.* Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures of §§ 300.500-300.517.

(c) *Reimbursement for private school placement.* If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll their child in a private preschool, elementary, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the state standards that apply to education provided by the SEA and LEAs.

(d) *Limitation on reimbursement.* The cost of reimbursement described in

paragraph (c) of this section may be reduced or denied –

(1) If –

(I) At the most recent IEP meeting that the parents attended prior to the removal of the child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(II) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(I) of this section;

(2) . . .

(3) Upon a judicial finding of unreasonableness with respect to the actions taken by the parents.

(e) *Exceptions*. Notwithstanding the notice requirements in paragraph (d)(1) of this section, the cost of reimbursement may not be reduced or denied for failure to provide the notice if –

(1) The parent is illiterate and cannot write English.
(2) Compliance with paragraph (d)(1) of this section would likely result in physical or serious emotional harm to the child;
(3) The school prevented the parent from providing the notice; or
(4) The parents had not received notice, pursuant to section 615 of the Act, of the notice requirement in paragraph (d)(1) of this section."

106. In order for an IEP to be valid, the procedural safeguards established by the IDEA must be followed and the IEP must be substantively appropriate. *Evans v. District No. 17*, 841 F.2d 824 (8th Cir. 1988).

107. The IDEA requires a school district to provide parents with procedural safeguards including access to records

pertaining to their child, the opportunity to participate in meetings regarding the identification, evaluation and educational placement of the child, and the provision of a FAPE. 20 U.S.C. § 1415(b)(1)(1997).

108. The procedural safeguards also assure parents of the opportunity to obtain an independent educational evaluation of the child and the receipt of written prior notice whenever the District proposes or refuses to take certain actions, *id.* @ section 1415 (b)(3), including initial referral/notice of intent to evaluate, initial placement, subsequent notice of intent to reevaluate, and notice of significant change in placement.

109. These procedural safeguards attempt to ensure that parents actively participate in their child's education. *Yankton School District v. Schramm*, 93 F.3d 1369 (8th Cir. 1996) (*citations omitted*).

110. An IEP should not be set aside unless the Petitioner's right to an appropriate education was compromised, the parents' opportunity to participate in the development of an IEP was seriously hampered, or the Petitioner was deprived of educational benefit as a result of the procedural violation. *Independent School District No. 283 v. S.D.*, 88 F.3d 556 (8th Cir. 1996).

111. Technical defects are not sufficient to render an IEP inappropriate if parents and the school district are aware of

the relevant information. *Independent School District No. 283 v. S.D.*, 88 F.3d 556 (8th Cir. 1996).

112. The education program offered by the District is appropriate if it is "reasonably calculated" to enable the child to benefit educationally. *Peterson v. Hastings Public School*, 31 F.3d 705, 707 (8th Cir. 1994) quoting *Board of Education v. Rowley*, 458 U.S. 176, 206-07 (1982).

113. In assessing whether educational benefit has occurred, a child's grades, test scores and advancement from grade to grade are important factors to consider. *Fort Zumwalt School District v. Clynes*, 119 F.3d 607 (8th Cir. 1997). 20 U.S.C. § 1412(1)(1997).

114. The IDEA does not require that the educational program maximize a student's potential or provide the best education possible. *Board of Education v. Rowley,* 458 U.S. 176 (1981). The results need not be superior. *Id.* However, as previously noted, Missouri law, as it existed during the 1995-96 and 1996-97 school years (which were the pertinent time frames for this decision), did require that an IEP maximize a student's "capabilities."

115. Petitioner contends that the District had to intend, at the time it was writing Petitioner's IEP, to write a maximizing IEP. We find no such requirement in either federal or Missouri law.

116. When assessing an IEP, this Panel must view it from the perspective of the time that it was written. *Fort Zumwalt School District v. Clynes*, 119 F.3d 607 (8th Cir. 1997). The measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date. *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993) ("Neither the statute nor reason countenance "Monday Morning Quarterbacking" in evaluating the appropriateness of a child's placement."). *See also Roland M. v. Concord School Comm.*, 910 F.2d 983 (1st Cir. 1990) (wherein the court held that, even in Massachusetts, which had the maximizing standard in place prior to January 1, 2002, "[a]n IEP is a snapshot, not a retrospective.").

117. In this case, the School District proved by more than a preponderance of the evidence that it had demonstrated a willingness to review and revise Petitioner's IEP throughout the 1995-96 school year. Then, before the 1996-97 school year was two months old, the IEP team had met twice and a third meeting had been scheduled. The IEP team willingly incorporated the Churchill School recommendations into Petitioner's IEP.

118. Petitioner's special education teacher, Ann Scott, documented Petitioner's educational growth. Ms. Scott was trained, certified, capable and experienced in teaching students with the types of disabilities Petitioner displayed. When new

diagnostic information was made available to the School District, the District has proven that it considered it and was willing to incorporate outside recommendations. Notably, the School District had sought to have Petitioner re-evaluated by the Assessment and Consultation Clinic at the University of Missouri-Columbia , but Parent failed to respond to this request, and eventually Petitioner's attorney rejected the proposed re-evaluation. Moreover, the School District had scheduled a third IEP meeting in October of 1996, at which time the test scores from the Michigan Dyslexia Institute could have been considered, but the Parents responded by withdrawing Petitioner from school.

119. We also note that the IEP team had sufficient information available to conclude the following: Petitioner had a normal IQ, Petitioner could achieve on par with his age-related peers, and Petitioner was receiving special educational services far beyond what was required by the IDEA at that time (e.g., Petitioner's deficits were limited to basic reading skills and written expression, yet Petitioner received one-on-one services with Ann Scott and a litany of services and modifications in areas outside Petitioner's areas of deficit, including but not limited to, behavioral issues, emotional self concept issues, organizational issues, math services, homework modifications, recess modifications and an agreement that "[Petitioner] will not be retained in any school year). In analyzing the relationship

of the severity of Petitioner's learning disability (which was considered quite mild) with the level of services provided, this Panel is left with the distinct feeling that the School District was attempting to provide Petitioner with an educational program that would provide him with something considerably more than de minimis educational benefits.

120. As long as a student is benefitting from his education, the selection of methodology is left to the educators. *E.S. v. Independent School District No. 196 Rosemount Apple Valley*, 135 F.3d 566, 569 (8th Cir. 1998) ("Requiring the District to change methodologies based on [the parent's] preferences would be creating the potential that a school district could be required to provide more than one method . . . for different students whose parents had differing preferences."). *Peterson v. Hastings Pub. Sch.*, 31 F.3d 705, 708 (8th Cir. 1994). As long as a student is benefitting from his or her education, it is up to the educators to determine the appropriate methodology. *See also McLaughlin v. Board of Education of Holt Public Schools*, 133 F.Supp.2d 994, 1005 (W.D. Mich. 2001) ("maximum potential standard does not necessarily require the best education possible or require a model education, adopting the most sophisticated pedagogical methods without fiscal or geographical constraints") (citations and internal quotations omitted).

121. If parents do not believe the program provides educational benefit, they may enroll their child in another school and obtain reimbursement if (1) the district did not offer a free appropriate public education and (2) the placement at the other school complies with the IDEA. *Fort Zumwalt School District v. Clynes*, 119 F.3d 607 (8th Cir. 1997) (*citation omitted)*.

122. Parents who place their disabled child in a private school without the consent of the school district assume the financial risk. *Evans v. District No. 17*, 841 F. 2d 824 (8th Cir. 1988).

123. Parents are not entitled to reimbursement for the costs of a unilateral placement when the district IEP provided a FAPE in the least restrictive environment. *Breen v. St. Charles*, 27 IDELR 1066 (8th Cir. 1998).

124. Equitable considerations are relevant in fashioning appropriate relief under the IDEA. *Moubry v. Independent School District No. 696*, 951 F. Supp. 867 (D. Minn. 1996). Appropriate relief is designed to ensure the student is properly educated within the meaning of the IDEA. *Id.*

125. The quality of the relationship between the parties may be considered as a factor in determining proper relief. *Metropolitan Government v. Guest*, 28 IDELR 290 (M.D. Tenn. 1998); *see also Leslie B. v. Winnacunnet Cooperative Schools*, 28 IDELR

271 (D.N.H. 1998).

DECISION

The Three Member Due Process Hearing Panel is unanimous in its decision, based upon the Findings of Fact and Conclusions of Law above, that although the District committed technical violations of the IDEA and Missouri law by not consistently implementing all facets of the IEP, the District provided Petitioner with a free appropriate public education at all relevant times.

Issues Raised in Petitioners' Request for Hearing

I. The Panel finds that the District did not fail to provide, as asserted by Petitioners, a free appropriate public education to Petitioner by failing to provide an appropriate educational program that included a course of systematic, direct, multisensory instruction daily by an instructor trained in the method in order to educate Petitioner in the sound structure of the American English language.

The educational program developed for Petitioner, which is contained in the IEP dated November 29, 1995, and carried forward into subsequent revisions, was carefully tailored to Petitioner's specific needs, substantively adequate, and reasonably calculated to enable him to benefit more than a de minimis amount educationally. Petitioner's grades and his advancement from fourth to fifth grade are evidence of

educational benefit that is more than trivial.

Parents participated fully in the development of Petitioner's educational program which was delivered in the least restrictive environment. Petitioners failed to prove that Petitioner required instruction in the Orton-Gillingham method in order to benefit educationally. As long as Petitioner was benefitting from the education provided by the District, the District had the right to choose the methodology.

II. The Panel concludes that violations occurred when some modifications contained in the IEP were not consistently implemented. These violations were of a minor nature and did not deprive Petitioner of educational benefit. However, unlike the previous Panel that heard this matter, this Panel declines to recommend specific remedial actions by the District.

III. The District did not unlawfully fail and refuse to pay Parent for her expenses incurred when she refused to allow the re-evaluation that the District was willing to offer and then withdrew Petitioner from school and unilaterally placed Petitioner in a summer school program at the Churchill School.

The District provided Petitioner with a free appropriate public education and, therefore, Parents are not entitled to be reimbursed for the cost of the Churchill program.

IV. The District erred in refusing to reimburse parent for the cost of the outside evaluation conducted by Jeanette A.

Williams, Ph.D. The District relied on parts of this evaluation and the battery of tests it administered to identify Petitioner as eligible for special education services. Furthermore, when Parent first expressed concern about Petitioner to Principal Hodits, Hodits had an obligation to inform Parent about special education. He did not do so, and Parent sought help from an outside source, which led to the evaluation by Dr. Williams.

Remedy

District is ordered to reimburse Parents for the cost of the evaluation conducted by Jeanette A. Williams, Ph.D. All other requests for reimbursement are denied.

DEVIATION FROM FORTY-FIVE DAY TIMELINE

Parents' request for due process was received by the Department of Elementary and Secondary Education November 19, 1997, which placed the statutory timeline originally at December 26, 1997. Upon a request for a continuance and extension of the statutory timeline by District, which was not opposed by Parents, the chairperson rescheduled the hearing for January 19, 1998 and extended the timeline to February 14. When Parents requested a continuance and extension of the timeline which District did not oppose, the chairperson rescheduled the hearing for April 20 and extended the timeline to June 1. Upon further request by Parents that the hearing be continued and the timeline extended, the hearing was scheduled to commence May 12 and the timeline was

extended to June 12.

The hearing began on May 12 and on May 14, during the afternoon of the third day of testimony, the attorney for the District received notice of a medical emergency involving his young child. The District asked for a continuance and the Parents agreed. The hearing was scheduled to reconvene on July 20, and the statutory timeline was extended to August 14, 1998.

The hearing panel heard the additional evidence July 20, 21 and 22. The Original Panel's decision was rendered and sent by certified mail on August 14, 1998. Correspondence documenting these procedures is contained in the original Panel's hearing exhibits #2 and #3.

Subsequently, Petitioner sought judicial review of the original Due Process Hearing Panel's decision in the Cole County Circuit Court on September 14, 1998. The School District then sought to have this matter removed to federal court on November 25, 1998. On December 28, 1998, Petitioner filed a Motion For Remand with the federal court. The Western District Federal Court granted the Motion for Remand on July 8, 1999. The Cole County Circuit Court affirmed the original Panel's decision on August 28, 2000.

On October 5, 2000, Petitioner appealed the Cole County Circuit Court's judgment to the Missouri Court of Appeals, Western District. After the parties briefed the case and argued

same to the Court of Appeals, the Court of Appeals issued its decision on December 18, 2001. After the Court of Appeals and the Missouri Supreme Court denied the parties' rehearing and transfer requests, the Court of Appeals remanded this matter back to the Cole County Circuit Court on March 25, 2002. On April 4, 2002, Petitioner requested that the Cole County Circuit Court remand this matter back to DESE's Due Process Hearing Panel. The Cole County Circuit Court did so on April 17, 2002.

On April 26, 2002, Petitioner requested that DESE reconvene the original Due Process Hearing Panel. On April 29, 2002, DESE advised the parties' counsel that two of the three members of the original Panel were no longer serving DESE as Due Process Panel members. Accordingly, the School District had to choose a new Panel member, and DESE had to appoint a new Chair of the Panel. On May 10, 2002, the School District chose George Wilson, and DESE appointed Robert K. Angstead to chair the Panel. On June 7, 2002, Petitioner filed a Motion to Extend Timeline with the Panel seeking an extension to August 30, 2002, in order to allow the two new Panel members time to become familiar with the facts and record in this matter. The Panel granted the extension on June 7, 2002. Pursuant to the parties' joint request, the Panel established a briefing and oral argument schedule on June 20, 2002. On July 26, 2002, the parties presented oral arguments to the Panel in Jefferson City, Missouri. This unanimous decision

was rendered by the Panel and sent to the parties by certified mail before August 30, 2002.

All concur.

_____
Robert K. Angstead, Chairperson

Dated this _____ day of August, 2002.